FIRE
Foundation for Individual Rights in Education

December 2, 2020

Justin Gordon
Chief, Open Records Division
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

Sent via the Public Information Act Electronic Filing System

Re: Public Information Request to Collin College
Request: October 13, 2020
Requestor: Adam Steinbaugh /
Foundation for Individual Rights in Education (FIRE)

Dear Mr. Gordon:

FIRE, the requestor in the above-entitled matter, submits this second public comment pursuant to Texas Government Code section 552.304 in response to the November 16, 2020, "Response to Letter from Requestor" ("Response") sent by Collin College (the "College") concerning FIRE's October 13, 2020, request for records.

The College's response hinges on its assertion that because it had—at the time of the request—a reasonable belief that Prof. Burnett had retained counsel, it had a reasonable anticipation of litigation. In doing so, the College misidentifies FIRE's reference to the "step the professor has not taken" as the retention of an attorney, arguing that this renders Burnett's public comments about retaining an attorney "misleading."

I. Section 552.103 requires objective steps toward actually filing a lawsuit, beyond retaining counsel and claiming injury.

FIRE's response did not assert that Burnett had not retained counsel, and Burnett's social media posts to that effect are not "misleading." Instead, the point was that it did not matter whether Burnett had retained counsel because she had not taken objective, affirmative steps

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beyond retaining counsel—that is, there is no "concrete evidence"[1] of "concrete steps"[2] toward litigation. That is the central reason why the College cannot meet its burden to show that the "potential opposing party"—that is, Burnett—had begun "to take objective steps toward *actually filing* a lawsuit" when the request was made.[3] Even where "an individual publicly threatens to bring suit," which Burnettt has not done, "but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated."[4]

Acts that would satisfy the "concrete evidence" standard include retaining an attorney to send correspondence "containing a *specific threat to sue*"[5] or express threats to file a lawsuit,[6] sending notices of claim under the Texas Tort Claims Act or other correspondence required as a prerequisite to filing suit,[7] filing claims with the Equal Employment Opportunity Office, [8] or, of course, actually filing a lawsuit against the governmental party.[9]

Conversely, "the mere fact that the prospective plaintiff has hired an attorney who then makes a request under the Act is insufficient to trigger" the exception.[10] Even when an "individual hires an attorney *and alleges damages*," that retention and claim does not satisfy the test. As a result, the Office of the Attorney General has found that this standard is *not* met in situations where the putative litigant did not take objective, concrete steps toward litigation—beyond hiring an attorney:

- An unsuccessful applicant for employment retained an attorney who requested records on his behalf concerning the reasons for rejection, but there were no "statements of intent to sue" or other facts indicating litigation would result;[11]

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[1] Open Records Decision ("ORD") No. 452 at 4 (1986).
[2] ORD No. 638 at 5 (1996).
[3] *Id.* at 3 (emphasis in original).
[4] *Id.*
[5] ORD No. 638 at 2–3 (1996) (emphasis added); *see also* ORD No. 288 at 2 (1981) (terminated principal repeatedly voiced an intent to file a lawsuit, retained an attorney to carry out the threat, and the school district intended to sue the principal even if he did not sue).
[6] ORD No. 551 at 2 (1990) ("demanding damages and stating that unless damages are paid, the attorney has been authorized to file suit"), ORD No. 555 at 2 (1990) (attorney informed the governmental body that he "intends to file suit"), ORD No. 323 at 1–2 (1982) (attorney publicly stated before a city commission that he "is prepared to sue" the city after demanding a refund on behalf of multiple clients), ORD No. 462 at 6 (1986) (multiple "threats of litigation, including at least one by an attorney on behalf of" a client").
[7] ORD No. 638 at 5 (1996); ORD No. 638 at 4 (1996); ORD No. 416 at 6 (1984); ORD No. 346 at 1 (1982) (demand from an attorney for disputed payments and committing to "[f]urther legal action" if the payments were not made).
[8] ORD No. 266 at 1 (1981), ORD No. 336 at 1 (1982).
[9] ORD No. 416 at 6 (1984).
[10] ORD No. 677 at 3 (2002).
[11] ORD No. 361 at 2 (1983).

- A requestor "publicly stated on more than one occasion that he . . . intend[s] to file suit against" the governmental body;[12] and where

- A requestor threatened to sue but did not make "actual steps toward litigation" or other acts to show that "his threat was meaningful."[13]

From what FIRE can divine of the College's characterization of its evidence, which it refuses to share, the College can establish that when it received the request, Burnett had hired an attorney and shared information about the College's conduct with that attorney. Even accepting the College's vantage-point (that Burnett had retained FIRE as her counsel) and even assuming FIRE's post-request letter can be considered, the College would have shown no more than that Burnett had "hire[d] an attorney and allege[d] damages." FIRE's letter makes no threat to file suit, nor has Burnett taken any steps toward actually filing a lawsuit.

II. The College's new allegations concerning FIRE's website do not suffice to carry its burden under Section 552.103.

Because this initial offering was insufficient to carry its burden, the College now argues in its response—for the first time—that it "reasonably anticipated litigation" because of content on FIRE's website and the form of the request. This new, retrospective rationalization does not change the analysis.

First, it is of no moment that FIRE's website discusses its advocacy work, which includes, in some instances, providing direct legal representation, placing students and faculty in touch with attorneys, filing *amicus curiae* briefs, and drawing public attention to infringements on civil liberties. While FIRE describes its advocacy work as "cases," the vast majority of its 578 cases do not involve litigation at all, and a *separate website* describes FIRE's litigation cases.[14]

Under the College's theory, a public records request from public advocacy organizations of any stripe—whether FIRE, the ACLU of Texas,[15] Alliance Defending Freedom,[16] Electronic Frontier Foundation,[17] Southern Poverty Law Center,[18] and so on—would evidence forthcoming litigation, frustrating the public transparency functions these organizations serve. Similarly, such a rule would hollow out prior Open Records Decisions: If retaining a private attorney who subsequently issues a request about a dispute does not satisfy the burden

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[12] ORD No. 331 at 1 (1982).
[13] ORD No. 351 at 2 (1982).
[14] FIRE, STAND UP FOR SPEECH PROJECT, https://www.standupforspeech.com/resources (last visited Dec. 1., 2020).
[15] ACLU OF TEXAS, COURT BATTLES, https://www.aclutx.org/en/cases (last visited Dec. 1, 2020).
[16] ALLIANCE DEFENDING FREEDOM, VIEW OUR CASES, https://www.adflegal.org/for-attorneys/cases (last visited Dec 1., 2020).
[17] ELECTRONIC FRONTIER FOUNDATION, LEGAL CASES, https://www.eff.org/cases (last visited Dec. 1, 2020).
[18] SOUTHERN POVERTY LAW CENTER, CASE DOCKET, https://www.splcenter.org/seeking-justice/case-docket (last visited Dec. 1, 2020).

under the anticipated litigation exception,[19] it follows that enlisting the help of a public advocacy organization that does the same does not meet that burden.

Second, the College argues that it anticipated litigation at the time of the request because Burnett's dispute with the College is included as a "case file" on FIRE's website. In mounting this argument, the College again seeks to introduce circumstances that did not exist at the time of the request: That page was created on October 16, 2020. *See* screenshot of WordPress, attached as **Exhibit M.** Because that page did not exist at the time of the request, it cannot be considered in determining whether the College reasonably anticipated litigation at that time.[20]

Third, the request for a "privilege log" is often included in public records requests.[21] Asking for a privilege log—which FIRE does in its requests, even if it is not required by public records laws—does not indicate that litigation is forthcoming.

III. The information is presumptively public because the College failed to provide the requestor with the information provided to the Attorney General.

The College's response made no effort to explain its refusal to share the information provided to the Attorney General in connection with its discussion of Section 552.103.

While the Act permits a governmental body to redact "the requested information" from the copies sent to the requestor, it requires that the agency provide copies of its "written communication to the attorney general" and the "written comments" offered in support.[22] Where the governmental body fails to "provide the requestor with the information" shared with the Attorney General, the requested information is presumed to be public "and must be released unless there is a compelling reason to withhold the information."[23]

The College did not do so. The Act authorizes a governmental body to withhold the requested information but makes no provision for refusing to provide other communications with the Attorney General. These additional exhibits are "written comments" offered by the College and incorporated into its letter memorandum by reference. The College's unjustifiable refusal to provide the basis for its position frustrates the ability of FIRE and the public to evaluate the merits of the College's opposition to disclosure.

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[19] ORD No. 677 at 3 (2002).
[20] ORD No. 677 at 2–3 (2002).
[21] *See, e.g.*, *The Church of Divine Earth v. City of Tacoma*, No. 53804-1-II (Wash. App. Ct., Apr. 14, 2020), *available at* http://www.courts.wa.gov/opinions/pdf/D2%2053804-1-II%20Published%20Opinion.pdf (city provided privilege log in response to public records request); *Rental Hous. Ass'n of Puget Sound v. City of Des Moines*, 165 Wash. 2d 525, 528, 199 P.3d 393, 394 (2009) (privilege log provided in response to public records request).
[22] Gov't Code § 552.301(d)(2), (e-1).
[23] Gov't Code § 552.302.

IV. Conclusion

Because (1) the College has failed to meet its burden to demonstrate that Section 552.103 applies and (2) the College's submission to the Attorney General was inappropriately withheld, and there is no compelling reason to withhold the requested information, FIRE respectfully submits that the Attorney General should determine that the information must be released.

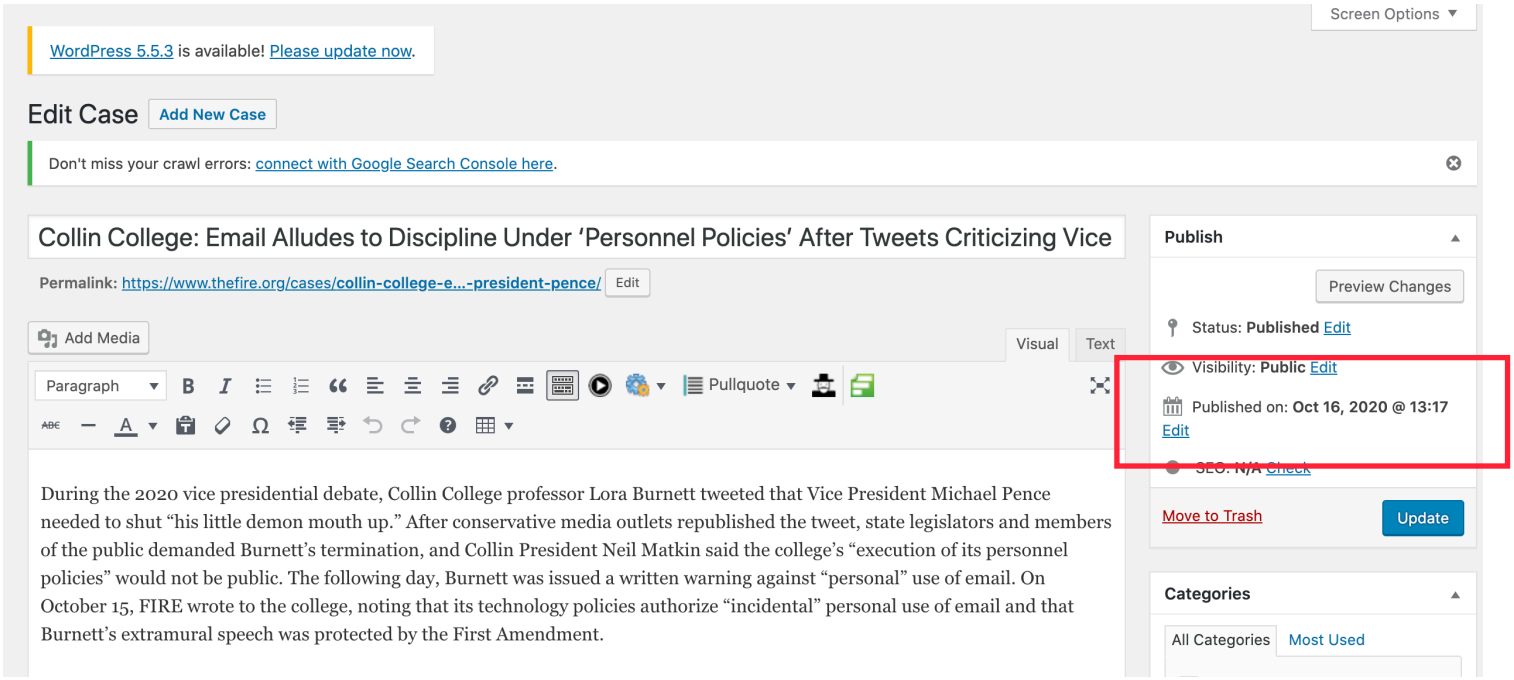
Sincerely,

Adam Steinbaugh
Director, Individual Rights Defense Program

Cc: Pete Thompson, via email

Encl.

EXHIBIT M


Screen Options
WordPress 5.5.3 is available! Please update now.
Edit Case
Add New Case
Don't miss your crawl errors: connect with Google Search Console here.
Collin College: Email Alludes to Discipline Under 'Personnel Policies' After Tweets Criticizing Vice
Permalink: https://www.thefire.org/cases/collin-college-e...-president-pence/
Edit
Add Media
Visual
Text
Paragraph
Pullquote
During the 2020 vice presidential debate, Collin College professor Lora Burnett tweeted that Vice President Michael Pence needed to shut "his little demon mouth up." After conservative media outlets republished the tweet, state legislators and members of the public demanded Burnett's termination, and Collin President Neil Matkin said the college's "execution of its personnel policies" would not be public. The following day, Burnett was issued a written warning against "personal" use of email. On October 15, FIRE wrote to the college, noting that its technology policies authorize "incidental" personal use of email and that Burnett's extramural speech was protected by the First Amendment.
Publish
Preview Changes
Status: Published Edit
Visibility: Public Edit
Published on: Oct 16, 2020 @ 13:17 Edit
Move to Trash
Update
Categories
All Categories
Most Used